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No. 98-85

IN THE

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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QUESTIONS PRESENTED

1. Should the appeal be dismissed because appellants have not properly preserved the constitutional issues for review by this Court?

2. Were appellees free to challenge the 1997 redistricting plan because appellants failed to plead claim preclusion by reason of an earlier judgment in a different action, the appellees were not in privity with the parties to that action, and the earlier judgment expressly allowed actions to challenge the 1997 plan?

3. May a three-judge district court enter summary judgment that a redistricting plan is unconstitutional when undisputed evidence as to the shape of a challenged district, its violation of traditional race-neutral redistricting principles, and the racial demographics of that district establish clearly that a racial purpose was predominant in its creation?

4. Even though not majority-black, is a congressional district subject to strict scrutiny under the Equal Protection clause when its irregular shape, its use of "white corridors" to link three urban concentrations of African-Americans, and its violation of race-neutral redistricting criteria combine with other evidence to establish clearly that race was the primary motive for its creation?

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ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
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MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 18.6, appellees move to dismiss the appeal on the ground that appellants have failed to present any justiciable issue for review by this Court, or, in the alternative, to affirm the judgment sought to be reviewed because the court below properly granted summary judgment and appellants have not raised a substantial question meriting review by this Court.

COUNTERSTATEMENT OF THE CASE

To provide the Court a better perspective as to the issues appellants seek to raise, appellees (plaintiffs below) submit their Counterstatement. It begins with the racially gerrymandered 1992 North Carolina redistricting plan, which this Court held unconstitutional in *Shaw v. Hunt*, 517 U.S. 899 (1996) (hereinafter "*Shaw II*").

A. The 1992 Redistricting Plan

In response to the 1990 census, which revealed that North Carolina was entitled to an additional congressional seat, the General Assembly enacted in 1991 a redistricting plan that included a single majority-black district. The Department of Justice, relying upon its erroneous "maximization" interpretation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973b, *see Miller v. Johnson*, 515 U.S. 900 (1995), denied preclearance of this redistricting plan because it lacked a second majority-black district. Soon thereafter, in January 1992, the General Assembly enacted a new plan, which contained two majority-black districts – the First and the Twelfth. Each had a "bizarre" shape, as did several other districts. The First District was in the northeastern part of North Carolina, where the percentage of African-Americans in the total population is greatest. The Twelfth District wound in a "serpentine" manner through the Piedmont region, following generally along highway I-85 from Gastonia to Durham, and used "white corridors" to connect concentrations of black citizens in Gastonia, Charlotte, Winston-Salem, Greensboro, High Point, and Durham. The Department of Justice swiftly precleared this plan.

Under the auspices of the Republican Party, a constitutional attack was launched against this plan on the ground that it was a political gerrymander intended to assist Democrats. This challenge was promptly rejected by a three-

judge district court. *See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992). At this time the state defendants were asserting that the plan could not be attacked as a political gerrymander because it actually was based on race and resulted from preclearance requirements of the Department of Justice.

Shortly after this challenge had failed, five registered voters in Durham, North Carolina – a city bisected by the Twelfth District – filed suit against various federal and state defendants. They alleged that the 1992 redistricting plan was motivated by race and was enacted to assure the election of African-Americans to Congress from the First and Twelfth districts.[1] As to the state defendants, the action was predicated, *inter alia*, on a violation of the plaintiffs' right to equal protection under the Fourteenth Amendment – a claim which this Court later recognized as "analytically distinct." *Shaw v. Reno*, 509 U.S. 630, 652 (1993) (hereinafter "*Shaw I*"); *Miller*, 515 U.S. at 911. After the three-judge district court dismissed the suit as to all the defendants,[2] the plaintiffs – one of whom acted as their attorney – appealed to this Court, which noted probable jurisdiction. When the appeal was subsequently argued before the Court, counsel for the state-defendants readily acknowledged that the redistricting plan was based on race.[3]

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[1]Of course, each of these two representatives would be a Democrat since 95% or more of the African-Americans in North Carolina are registered as Democrats.

[2]*See Shaw v. Barr*, 808 F. Supp. 461 (1992), *rev'd in part*, 509 U.S. 630 (1992).

[3]*See* oral argument in *Shaw I*, Tr. at 14, 22 ("[T]he North Carolina General Assembly intentionally created two majority-minority congressional districts." ... "There's no dispute here over what the state's purpose is. There's a dispute over how to characterize it legally, but we're not in a disagreement over what the state legislature was trying to do" (H. Jefferson Powell, on behalf of the state appellees)).

After this Court reversed the lower court and remanded the case for trial, *see Shaw I*, the state defendants radically changed their position and claimed that, although considered by the General Assembly, race had not been a predominant motive in drawing the two challenged districts. Although these districts obviously were not "geographically compact,"[4] the defendants insisted that they were "functionally compact." Nevertheless, the District Court readily concluded that both districts were race-based – although a majority of the three-judge court held that the two districts could survive strict scrutiny. *See Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994).

On appeal by the plaintiffs to this Court, the defendants continued to assert that neither the First nor the Twelfth District was motivated by race.[5] However, on June 13, 1996 the Court held that the creation of the Twelfth District had been motivated predominantly by race and that, contrary to the lower court's decision, this district could not survive strict scrutiny since it was not "narrowly tailored." *Shaw II*. Because none of the plaintiff-appellants in that case were registered to vote in the First District, the Court ruled that they lacked standing to challenge that district and therefore its constitutionality would not be decided. *See id.* at 904. The case was remanded for further proceedings.

Shortly thereafter, Martin Cromartie and two other persons filed suit in the Eastern District of North Carolina to challenge the First District as an unconstitutional racial gerrymander. Since all three plaintiffs were registered to vote in that district, they clearly had standing under *Shaw II*.

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[4]*See* Defendant-Appellants' Appendix at 61a (hereinafter "App."). The Justices will probably recall the much larger map of the 1992 plan which was lodged with the Court and used by counsel for plaintiff-appellants in the oral argument of each *Shaw* appeal.

[5]Because the five plaintiffs were white, the state defendants also contested the ruling of the three-judge district court that they had standing.

Meanwhile, the successful appellants in *Shaw II* were seeking without success to persuade the General Assembly to enact a new redistricting plan for the 1996 elections. Those plaintiffs also were unable to convince the three-judge district court that it should draw a redistricting plan for the 1996 elections unless the General Assembly promptly did so.[6] However, the district court did rule that unless the Legislature drew a new plan by April 1, 1997, the court would itself do so. In light of the developments in the *Shaw* litigation, Cromartie and his fellow plaintiffs agreed to a stay of proceedings in their action.

B. The 1997 Redistricting Plan

On March 31, 1997, the General Assembly enacted a new redistricting plan whereunder Durham County was removed from the Twelfth District. Since all five *Shaw* plaintiffs resided in Durham, they no longer were registered to vote in the Twelfth District; and so under *Shaw II* they lacked standing to challenge that district.[7] After the Department of Justice granted preclearance of the 1997 plan, the three-judge district court entered an order on June 9, 1997 directing the *Shaw* plaintiffs to advise the court within ten days "whether they intend to claim that the plan should not be approved by the court because it does not cure the constitutional defects in the former plan and to identify the basis for that claim." App. at 181a–182a. In their response, the plaintiffs stated their view that the 1997 plan had continuing constitutional defects, but forthrightly they pointed out that "due to their lack of standing,

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[6]See Judgment in *Shaw v. Hunt* (No. 92-202-CIV-5-BR, filed July 31, 1996). Like most of the rulings of that court, it was by divided vote. Subsequently, the *Shaw* plaintiffs were unsuccessful in seeking a writ of mandamus from this Court to require the district court to adopt a remedial plan for the 1996 elections. *In re Shaw et al.*, 518 U.S. 1045 (1996).

[7]Moreover, unlike the 1992 plan, Durham County was not divided and was placed in a geographically compact District 4. *See* App. at 59a.

any attack on the constitutionality of the new redistricting plan should be undertaken in a separate action maintained by persons who have standing." *Id.* at 186a.

The subsequent memorandum opinion entered by the district court on September 12, 1997 (*id.* at 159a–168a) approved the plan but specifically stated:

> [W]e close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not – cannot – run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

Id. at 167a.

In October 1997, the district court dissolved the stay order entered previously in the Cromartie action; and an amended complaint was filed, which added plaintiffs from the Twelfth District and additional plaintiffs from the First District. The state defendants obtained a short extension of time to answer and filed a motion in *Shaw v. Hunt* to consolidate with it the action that had been filed by Cromartie as well as a different action, *Daly v. High*, No. 5:97-CV-750-BO (E.D.N.C.),[8] which challenged both North Carolina's

[8]The case is now captioned *Daly v. Leake* and will be referred to hereafter as *Daly*.

redistricting plan and its legislative reapportionment. This motion was denied by the *Shaw* three-judge court. *See* Plaintiff-Appellees' Appendix at 1a (hereinafter "P-A App.").

On January 15, 1998 Cromartie's action was assigned to the three-judge district court which was considering the *Daly* case.[9] Thereafter, the court proceeded quickly to hear conflicting motions for summary judgment filed by the Cromartie plaintiffs and the State defendants. The court rendered summary judgment against the defendants and enjoined use of the 1997 redistricting plan in the 1998 primaries and elections. *See* App. at 45a. The defendants unsuccessfully sought a stay order from the district court and then appealed its denial of a stay to this Court, which also denied their application for a stay.[10] The defendants subsequently applied fruitlessly to the district court for leave to conduct primary elections under the 1997 plan in six congressional districts in eastern North Carolina that had been created by that plan.

C. The 1998 Redistricting Plan

The district court had allowed the General Assembly until May 22, 1998 to submit a redistricting plan for the 1998 elections. On May 21, 1998, a plan was enacted which left the First District as it had been drawn in 1997, but modified the Twelfth District. The plaintiffs filed their objections to the 1998 plan within the three day period allotted by the district court, and the state defendants responded in a like period. Subsequently, the plan was precleared by the Department of Justice and then, on June 22, 1998, was approved by the three-

[9]Until that time the *Cromartie* action had been pending before Judge Malcolm Howard, and no three-judge panel had been designated. The panel for *Daly* had been designated previously.

[10]*See Cromartie v. Hunt*, 118 S. Ct. 1510 (1998) (Stevens, Ginsburg, and Breyer, JJ., dissenting).

judge district court for the 1998 election. However, the court noted that as to the First District neither the plaintiffs' motion for summary judgment nor that of the defendants had been granted. Therefore a trial would be necessary. *See* App. at 179a-80a. Moreover, at trial the plaintiffs could offer further evidence as to the racial motive for the Twelfth District.[11] *See id.* Pursuant to 28 U.S.C. § 1253, plaintiffs, who are appellees in the present appeal, filed notice of appeal from the district court's denial of their requested injunction.

SUMMARY OF THE ARGUMENT

The appeal from the decision of the district court should be dismissed because appellants have not presented to the Court a justiciable "case or controversy" for decision. *See* U.S. Const., Art. III, § 2. The language of the Session Law enacting the 1998 plan does not suffice to preserve for appellate review the issue of the constitutionality of the 1997 plan. The defendant-appellants have estopped themselves from denying that this issue is moot.

If the appeal is not dismissed for want of a "case or controversy," the judgment entered below should be affirmed. Appellants' attempt to invoke claim preclusion is barred by their failure to plead such a defense in their answer or otherwise to raise it in a timely manner. Even if appellants had timely asserted a defense of claim preclusion, their argument would fail on the merits, for no privity existed between the present appellees and the parties involved in the earlier judgment. Indeed, the terms of the original judgment of the three-judge district court in September 1997 make clear that the present appellees were not precluded by that judgment. *See* App. at 167a.

The unrefuted evidence presented by appellees to the

[11]In preparation for that trial, a scheduling order has now been entered which contemplates completion of discovery by December 11, 1998.

three-judge district court demonstrates clearly that summary judgment was properly granted. As this Court has made clear, circumstantial evidence alone can prove a predominantly racial motive. Appellees' unrefuted evidence of lack of compactness, splitting of counties and towns along racial lines, and use of predominantly white, narrow "land bridges" to connect concentrations of African-Americans into a single tortured district amply established the legislature's predominantly racial motive in drawing the Twelfth District. Although appellees' strong circumstantial evidence, standing alone, proved the General Assembly's predominantly racial motive, direct evidence also supports appellees' case. When considered in context, statements made by the legislators who drafted the 1997 redistricting plan constitute implied admissions that race had predominated in drawing the boundaries of the Twelfth District. The purported justifications of the plan were unsuccessful attempts to disguise the legislators' racial motive and to preserve the products of the unconstitutional 1992 plan.

In granting summary judgment, the district court did not lower the threshold for strict scrutiny, and its decision conformed to the precedents of this Court. Although in defending the 1997 plan, appellants have emphasized that District 12 is only 46.67 percent black, rather than majority-black, this fact provides no excuse for the racial gerrymander.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED AS NONJUSTICIABLE.

The "judicial power" of the United States can be invoked only if there is a "case or controversy." *See* U.S. Const., Art. III, § 2. Indeed, "case" or "controversy" is a "'bedrock requirement.'" *See Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,

454 U.S. 464, 471 (1982)). Admittedly, the difference between "abstract question and 'case or controversy' is one of degree ... and is not discernible by any precise test." *Babbitt v. United Farm-Workers Union*, 442 U.S. 289, 297 (1979).

Occasionally when a statute is superseded by a later enactment, issues arising under the former statute become moot and are nonjusticiable. Perhaps the General Assembly had this possibility in mind when it employed this language in enacting the 1998 redistricting plan:

> Section 1. G.S. 163-201 reads as rewritten:
>
> (a) For the purpose of nominating and electing members of the House of Representatives of the Congress of the United States in 1998 and every two years thereafter, the State of North Carolina shall be divided into 12 districts as follows:
>
> * * *
>
> Section 1.1: The plan adopted by this act is effective for the elections for the years 1998 and 2000 *unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.*

1997 N.C. Sess. Laws 1998-2, enacted May 21, 1998 (emphasis added). Section 1.1 appears to be unprecedented.[12]

In enacting the 1997 redistricting plan, the General Assembly had included a provision for substitution of a

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[12]In the General Assembly, Section 1.1 was deleted from the House Bill by the House Redistricting Committee but later was added back before the bill was passed in the North Carolina House of Representatives and sent to the Senate.

different plan if the 1997 plan were held unconstitutional because its districts lacked precise numerical equality.[13] On the other hand, Section 1.1 of the 1998 plan would substitute a previous plan for an existing plan that has not been held unconstitutional. Moreover, the substitution would be accomplished without any formal repeal of the more recent legislation or any specific enactment of the earlier plan.[14]

It is uncertain what event would qualify to make the 1998 plan not "effective for the elections for the years 1998 and 2000." For example, what ruling by this Court would be deemed to have "reverse[d] the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act"? Appellees sought both a preliminary and a permanent injunction against use of the 1997 plan. Would a "reversal" have occurred if the Court held that appellees had not been entitled to summary judgment but were entitled to a preliminary injunction?[15] Furthermore, unless the Court concluded that the defendants had been entitled to

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[13]The text of that provision is as follows:

> In the event that a court of competent jurisdiction holds that the plan enacted by section 2 of this act is invalid because the total population range violates the one-person, one-vote doctrine and that decision is not reversed, then the plan enacted by section 2 of this act in G.S. 163-201 is repealed and the following plan enacted in G.S. 163-201.

1997 N.C. Sess. Laws 1997-11, section 3, effective March 31, 1997.

[14]Whether the language of Section 1.1 would be sufficient to repeal Session Law 1998-2 or revive Session Law 1997-11 seems questionable. If the "reversal" were to occur after the 1998 election and new state legislators have been elected, applying Section 1.1 might be deemed to violate the principle that one legislature cannot bind a successor legislature. *See State v. Wall*, 271 S.E.2d 363, 369 (N.C. 1967).

[15]Whether to grant a preliminary injunction is to be determined in the trial court's discretion upon weighing likelihood of success against harms to the parties from granting or denying the injunction.

summary judgment as to the First and Twelfth districts under the 1997 plan, a trial would be necessary as to those districts.[16]

If, despite such uncertainty, Section 1.1 were applied, its application would create great confusion. Under its terms, Section 1.1 would apply even to the 1998 elections if this Court "reverses the decision" of the district court prior to the November 1998 election date. Since that possibility seems remote, probably the 1998 redistricting plan will govern election of the next members of Congress from North Carolina. If, however, this Court subsequently "reverses the decision holding G.S. 163-201 unconstitutional," and the 1997 plan comes into effect, its constitutionality probably would still have to be determined in a trial. Meanwhile, if the 1998 plan now in effect were superseded by the less geographically compact, more racially gerrymandered 1997 plan, the pending trial with respect to the 1998 plan might be mooted. This potential chaos that Section 1.1 could produce makes it highly unlikely that the General Assembly would ever allow it to be applied.

Under these circumstances appellees submit that Section 1.1 of the 1998 plan does not suffice to make justiciable the issues which appellants seek to raise in this appeal. Indeed, in adding Section 1.1 to the 1998 plan, the General Assembly made a transparent attempt to obtain from the Court an advisory opinion about the constitutionality of the superseded 1997 plan.

Moreover, appellants have now estopped themselves from claiming that the constitutionality of the 1997 plan is a justiciable issue. On July 22, 1998, appellants submitted to the three-judge district court a motion to consolidate this action with the *Daly* case. In the memorandum attached to the motion to consolidate, appellants state:

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[16]The district court denied both parties' motions for summary judgment as to the First District in the 1997 plan, and presumably trial as to the First and Twelfth districts in that plan would be necessary.

> *Cromartie* includes a challenge to Congressional District 12 in the State's 1997 congressional plan, Section 2 of Chapter 11 of the 1997 Session Laws. *However, the challenge to District 12 has been rendered moot by the judgment of this Court declaring District 12 unconstitutional and the permanent injunction requiring the State to enact a new congressional plan ..., which substantially modified the boundaries of District 12.*

Mem. at 2, n.2 (P-A App. at 3a) (emphasis added).[17] Having represented to the lower court in this same action that the constitutional challenge to District 12 is moot, and appellants having made this representation after filing their jurisdictional statement, they are now estopped from pursuing their effort to obtain an advisory opinion from this Court – which hardly needs such a time-consuming distraction.

II. APPELLEES WERE NOT PRECLUDED FROM CHALLENGING THE 1997 REDISTRICTING PLAN.

A. Appellants' assertion of claim preclusion is untimely and should be disregarded.

The contention by appellants in their jurisdictional statement that claim preclusion bars the action brought by appellees comes much too late. Both the Federal Rules of Civil Procedure and well-settled case law clearly provide that *res judicata*, or claim preclusion, is an affirmative defense which must ordinarily be raised in the pleadings. *See* Fed. R. Civ.

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[17]Ms. Tiare Smiley, Special Deputy Attorney General, signed both the jurisdictional statement and the motion to consolidate.

Proc. 8(c).[18] The defense of claim preclusion "cannot be raised for the first time on appeal." 18 C. Wright, *et al.*, *Federal Practice & Procedure* § 4405 (p. 35) (Supp. 1998).[19]

The rationale behind these procedural limitations is clear: to provide the opposing party a fair opportunity to meet the defense, *see Blonder-Tongue Lab., Inc. v. University of Ill.*, 402 U.S. 313, 350 (1971), and to serve the basic "policy of judicial economy that is integral to the preclusion doctrines, [which] is impeded if not defeated by excessive delay." 18 James Moore, *et al.*, *Moore's Federal Practice* § 131.50[5] (3d ed. 1998). Untimely assertion of a preclusion defense undercuts this basic policy of judicial economy, since the court hearing the case and the parties themselves will have already expended scarce time and resources in arguing the case and possibly docketing and briefing an appeal.

Appellants rely upon the September 12, 1997 order and memorandum opinion of the three-judge district court in *Shaw v. Hunt* (*see* App. at 157a, 159a) as a judgment that precludes the present claims. However, that judgment was entered more than two months before the appellants filed their answer on November 27, 1997; and they never sought to amend that answer. Moreover, appellants did not assert claim preclusion

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[18]*See also Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir.), *cert. denied*, 488 U.S. 948 (1988); *Crowe v. Cherokee Wonderland, Inc.*, 379 F.2d 51, 54 (4th Cir. 1967).

[19]If a case has progressed past the pleadings and is in the pre-trial or trial phase when an allegedly preclusive judgment is rendered in another case, the defense of claim preclusion must be asserted at that time – namely, as soon as the defense becomes available. *See Totalpan Corp. of Am. v. Colborne*, 14 F.3d 824, 832 (2d Cir. 1994); *see also White v. American Airlines, Inc.*, 915 F.2d 1414, 1424 (10th Cir. 1990) (holding defense "waived" when it had become available the week before trial but was not raised until one year after judgment); *Explosives Corp. of Am. v. Garlam Enters.*, 817 F.2d 894, 900-01 (1st Cir. 1987) (six months' delay in raising the defense was "inexcusable").

in their briefs supporting their motion for summary judgment and in opposing appellees' motion for preliminary injunction and summary judgment. Not until they filed their jurisdictional statement did appellants mention claim preclusion. Even assuming, contrary to the record, that appellants' assertion of claim preclusion were properly grounded in law or fact, their delay until appeal to raise this defense contradicts the often-expressed rationale for the doctrine of res judicata and constitutes waiver.

B. The *Shaw* plaintiffs were not privies or "virtual representatives" of appellees.

Even if appellants had asserted the defense at the proper stage of the proceedings, claim preclusion would not apply. The judgment relied on by appellants as "preclusive" of the appellees' claims is the September 12, 1997 order of the three-judge district court which conducted the remedial phase of *Shaw v. Hunt* (*see* App. at 159a). As to appellees and their claims, that judgment fails to satisfy the privity requirement of claim preclusion and as a result does not bar the claims presented by appellees.

In order for an earlier judgment to preclude a later claim, the original judgment must involve the same parties as the present case, or persons in privity with them.[20] *See Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Moreover, the original judgment must be a final judgment rendered on the merits. *See id.* When a plaintiff in the current case was not a party to the original judgment, that plaintiff must be in privity with the original plaintiffs if the original judgment is to have any preclusive effect. *See Hansberry v. Lee*, 311

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[20]Privity is generally defined as the existence of an express or implied legal relationship between two or more parties, such as family members, members of a class action, employers-employees, administrators, and executors. *See Moore's* § 131.40[1].

U.S. 32, 41-43 (1940) (describing privity in class actions). Closely related to the traditional concept of privity is the somewhat more recent notion of "virtual representation," which exists if the original plaintiff's interests are so closely aligned as to be identical with those of the present plaintiff. For this doctrine to apply, however, the parties must have more than a similarity of interests. Indeed, the Fifth Circuit has adopted a privity-like standard for virtual representation – the parties must enjoy an express or implied legal relationship to be "virtual representatives." *See Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992).[21] Other circuits have abandoned the legal relationship requirement for a factor-based analysis, identifying as relevant criteria "participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering [to avoid preclusion], and close relationships between the parties and nonparties." *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (finding that original plaintiff was virtual representative of current plaintiffs, who were his wife and children) (citation omitted).

In the context of the present case, the same-party/privity requirement is not satisfied. Although the September 1997 approval did constitute a final judgment on the merits for the *Shaw II* plaintiffs, the district court carefully excluded other parties from the judgment's effect:

> [W]e only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not – cannot – run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

Shaw v. Hunt (E.D.N.C. Sept. 12, 1997) (App. at 167a). Thus the approval of the plan was a final judgment only as to those *Shaw* plaintiffs whose standing had been recognized by this Court in *Shaw II*. Those plaintiffs were all residents of Durham County, part of which was included in District 12 under the 1992 plan. The current appellees are residents of Edgecombe County in District 1 under the 1997 plan and Rowan, Guilford, and Mecklenburg counties in District 12. They have no express or implied legal relationship to any of the Durham County plaintiffs identified in the September 1997 judgment.

Appellants' assertion that the *Shaw* plaintiffs were "virtual representatives" of the current appellees also fails. The plaintiffs whose claims were resolved by the September 1997 order had successfully challenged the creation of District 12 by the 1992 redistricting plan. The present appellees, by contrast, challenged Districts 1 and 12 as drawn in the 1997 redistricting plan. Appellees may have a similarity of interests with the *Shaw* plaintiffs; but they lack the level of identification necessary for virtual representation.[22] That which might constitute virtual representation – e.g., consent to be bound, a close relationship between the parties, tactical maneuvering to avoid preclusion – is absent.

C. The district court conducting the remedial phase of *Shaw v. Hunt* specifically provided in its order and opinion that its decision only applied

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[21] *See also Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (parties were represented by same attorney and asserted same claim based upon same facts, but due to absence of express or implied legal relationship later action was not precluded).

[22] The fact that the two sets of plaintiffs are represented by the same attorney is of little relevance. Indeed, it seems odd to suggest that an attorney experienced in redistricting litigation cannot represent those who seek his pro bono counsel.

to the plaintiffs and claim identified by the Supreme Court before remand.

In handling the remedial proceedings in *Shaw v. Hunt*, the district court's responsibility was to oversee the fashioning of a remedy to address the constitutional violations suffered by the original plaintiffs. Since this Court had dismissed the claims concerning the constitutionality of the First District, the district court had no authority to consider the 1997 plan's adequacy to remedy any constitutional flaw of the First District. Contrary to appellants' suggestion, potential constitutional challenges that might be made to the 1997 plan's First and Twelfth Districts by persons who had standing were not "snuffed out" by the order of September 12, 1997. To the contrary, in its memorandum opinion accompanying that order, the three-judge district court expressly noted the limitations on its approval and made no determination regarding the challenges to the 1997 plan that might be made by persons who had standing.[23]

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE UNCONSTITUTIONALITY OF DISTRICT 12.

Assuming *arguendo* that appellees bore the burden of

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[23]Further evidence of the separate identities of the present action and the *Shaw* remedial judgment is the *Shaw* panel's denial of the defendants' motion to consolidate *Shaw*, *Cromartie* and *Daly*. The *Shaw* defendants' motion, filed in October 1997, requested that the three cases be consolidated pursuant to Fed. R. Civ. Proc. 42(a) because they presented common issues of law and fact. Even though the threshold for consolidation is significantly less demanding than that required to establish claim preclusion or even to prove that an original plaintiff was a "virtual representative" of a later plaintiff, the court denied the motion and allowed the three cases to proceed independently. *See* P-A App. at 1a.

persuasion – which they dispute[24] – appellees nevertheless met the standard for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c). The moving party is entitled to summary judgment when a rational trier of fact, after considering the record as a whole, could not find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The "mere existence of a scintilla of evidence" for the non-moving party's position is insufficient to defeat a properly supported motion; there must be enough evidence for a reasonable jury to find for the non-

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[24]To obtain summary judgment, appellees were required by the district court to establish as an irrefutable fact that the General Assembly had a predominantly racial motivation in drawing the 1997 plan. Instead, the burden should have been placed on appellants to show that there was no racial motive and that there was no "vestige" of the 1992 racially-motivated plan. Only this approach is consistent with the Court's decisions in other fields of equal protection law. For example, in the school desegregation cases, once an equal protection violation had been proved, the local school authorities and the district courts were required to "eliminate ... all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Having established that continuing violation, a plaintiff is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). Likewise in criminal cases, the state must show that any "taint" caused by a violation of a defendant's rights has been attenuated and that there is no "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). Although a broad scope should be allowed for legislative discretion, once it has been proved that this discretion has been improperly exercised the courts have a special responsibility to assure that the unconstitutional intent has been extinguished when the legislature takes remedial action. Since the General Assembly had enacted an unconstitutional redistricting plan in 1992, appellants should have been required to prove that the 1997 plan was not racially motivated.

moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).[25]

To prove an equal protection violation in a redistricting case, the plaintiff may prove a race-based motive "*either through circumstantial evidence of a district's shape and demographics or* through more direct evidence going to legislative purpose." *Shaw II*, 517 U.S. at 905 (citations omitted) (emphasis added). Thus, circumstantial evidence alone may suffice to warrant summary judgment. Here there is an abundance of circumstantial evidence – much of which either was provided by appellants or was subject to judicial notice under Fed. R. Evid. 201. Moreover, upon analysis, the contradictions and hidden meanings in the statements of legislators help establish that the Twelfth District was drawn with a predominantly racial motive.

A. The shape and demographics of District 12 and its disregard of traditional redistricting principles prove the predominantly racial motive.

A visual comparison of the maps makes evident that the Twelfth District in the 1997 plan bears an unacceptable likeness to its predecessor "I-85" district in the 1992 plan[26] – the plan this Court held unconstitutional in 1996 (*Shaw II*).

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[25]*See also Aleyska Pipeline Serv. Co. v. U.S. E.P.A.*, 856 F.2d 309, 314 (D.C. Cir. 1988) ("a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists"); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) ("[u]nsupported allegations as to motive do not confer talismanic immunity from Rule 56").

[26]*See* App. at 59a, 61a. Also, appellees are lodging with the Court four maps which were before the district court and which make even clearer that those who drafted the 1997 plan followed the race-based approach used in the 1992 plan.

The district "winds its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of cities such as Statesville, Salisbury, and Winston-Salem." *See* Mem. Op. (App. at 19a). District 12 splits all of its six counties; and it is the only congressional district in the 1997 plan that does not contain a single whole county. Significantly, the three largest of the six counties are divided along racial lines. As Dr. Ron Weber, a redistricting expert, points out:

> [T]he racial makeup of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American .... Almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population ... [and which] are located at the extremes of the district.

Weber Decl. ¶ 18. Mecklenburg, Forsyth, and Guilford counties – which contain almost 75 percent of District 12's population – are divided in such a manner that the portion of each county which contains a majority of African-Americans is included in District 12, while the portion containing a greater concentration of white voters is excluded.[27] Dr. Weber also observes that the splitting of political subdivisions to maximize black population in the Twelfth District occurred not only for

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[27]Under the 1997 plan, the portion of Mecklenburg County included in District 12 was 51.9% black and 45.9% white, while the portion of the county placed in neighboring District 9 was 90.4% white and a mere 7.2% black. The portion of Forsyth County included in the Twelfth was 72.9% black and 26.3% white, while the part of Forsyth included in District 5 was 87.7% white and only 11.1% black. The part of Guilford County included in District 12 was 51.5% black and 46.5% white, while the portion assigned to District 6 was 88.2% white and 10.2% black. *See* Weber Decl. at Table 2.

counties but also for cities and towns. The major cities in the Twelfth District – Charlotte, Greensboro, Winston-Salem, High Point and Statesville – are split along racial lines, with the precincts included in District 12 having a greater population of black citizens than the precincts left for other districts.[28] In addition to the egregious splitting of counties and cities along racial lines, the plan also employs narrow "land-bridges" to connect the far-flung communities of African-Americans and make surrounding districts contiguous.[29]

Appellees have also submitted other uncontroverted evidence as to the disregard for traditional districting principles – such as compactness and geographical integrity – in creating District 12 under the 1997 plan. For example, Professor Timothy O'Rourke's evaluation of the compactness of District 12 using recognized statistical methods reveals that of the United States' 435 congressional districts, "[i]f the 1992 rankings had remained unchanged, the [1997] version of the Twelfth would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter

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[28]The portion of Charlotte included in District 12 is 59.5% black, while the portion left for District 9 is only 8.1% black. The portion of Greensboro placed in District 12 is 55.6% black, while the part of the city left for District 6 is only 10.7% black. The portion of Winston-Salem assigned to District 12 is 77.4% black, while the portion assigned to District 5 is only 16.1% black. The portion of High Point placed in District 12 is 51.4% black, while the portion in District 6 is only 11.7% black. In Statesville, the portion included in District 12 is 75.4% black, while the portion included in District 10 is only 18.9% black. *See* Weber Decl. at Table 4.

[29]For example, in District 12 "a narrow land bridge is used to connect Davidson County with the city of Greensboro in Guilford County." (Weber Decl. ¶ 31.) One precinct at the southern tip of District 12 is divided so that its northern half -- all precinct residents but one -- is in the Twelfth District, while its southern half -- only one person -- forms a two-mile wide land bridge connecting the otherwise non-contiguous wings of District 9. *See* O'Rourke Aff. ¶ 5(c); *see also* App. at 59a.

measure." O'Rourke Aff. ¶ 4(d). Indeed, the Twelfth District's dispersion and perimeter compactness figures fall below those of contested districts from four other states: Florida, Georgia, Illinois, and Texas. *See* Mem. Op. (App. at 21a).

B. Direct evidence confirms the predominantly racial motive in drawing District 12.

In submitting the 1997 plan for Section 5 preclearance, the State represented to the Department of Justice that five factors were emphasized in locating and shaping the Twelfth District. *See* App. at 63a. That representation is misleading in several respects.[30] Moreover, although "geographic compactness" is mentioned in the Section 5 submission as one of five factors considered in drawing the plan, the affidavit of Senator Roy A. Cooper, III, Chair of the Senate Redistricting Committee, omits it as a factor (App. at 72a), and that of Representative McMahan, Chairman of the House Redistricting Committee, makes no specific reference to geographic compactness as a factor that was considered.[31] *Id.* at 81a, 83a.

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[30]Contrary to the State's representation, (1) the Twelfth District split all of its six counties; (2) it has a long "corridor" of predominantly white precincts to connect concentrations of blacks in Charlotte, Winston-Salem, and Greensboro -- a corridor only one precinct wide in many places; (3) it is not geographically compact and, indeed, ranks at the bottom of the compactness scale for congressional districts in North Carolina and nationally; (4) it is "functionally compact" only if "function" is equated to race; (5) it lacks "ease of communication" in any meaningful sense because the district's voters are divided between two Metropolitan Statistical Areas (MSA's) and spread over several media markets.

[31]It is typical of the inconsistencies and contradictions on the part of the state legislators and appellants that Senator Cooper declared in a committee meeting in March 1997, "We've strived to follow the direction of the Supreme Court to draw more geographically compact districts." State's Section 5 Submission, 97C-28F-4D(3) at 1. Yet Senator Cooper failed to acknowledge this effort in his affidavit, and appellants concede now that "the legislature did not ... select geographical compactness as a criterion

The spuriousness of the representations in the Section 5 submission is itself evidence of the effort to disguise the General Assembly's racial motive.[32]

The submission's reference to "functional compactness" as a factor in drawing the Twelfth District and the use of the same term by Senator Cooper in his affidavit (*id.* at 72a) reveal another tactic used to mask the legislature's racial motive.[33] Both the Section 5 submission and Senator Cooper define this term to mean "grouping together citizens of like interests and needs." *Id.* However, the separation of predominantly black precincts in Greensboro, Charlotte, Winston-Salem, and High Point from neighboring white precincts in those cities can only be related to that definition of "functional compactness" if it is assumed that African-Americans in those cities all have "like interests and needs," and that the persons in neighboring predominantly white precincts in those cities have different "interests and needs." Obviously, such logic relies on "racial stereotyping," which the Court denounced in *Shaw I*.

The Section 5 submission (*see* App. at 64a) and the affidavits of Senator Cooper (*see id.* at 74a-75a) and

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to receive independent emphasis in drawing the plan." J.S. at 22.

[32]Citing *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997), appellants assert that a contested district's lack of compactness does not necessarily prove a predominantly racial motive. In that case, however, the challenged legislative district's shape did not "stand out as different from numerous other Florida House and Senate districts." *Id.* In North Carolina, on the other hand, District 12 is significantly less compact than the state's other congressional districts.

[33]Previously, in seeking to justify race-based District 12 under the 1992 plan, the same counsel for the State minimized "geographic compactness" and relied on "functional compactness." *See* State Appellees' Brief in *Shaw II*, at 21-22. In their view "to a large extent, compactness is in the eye of the beholder." Tr. of Argument at 26. This premise, while ignoring the statistical measures of "compactness," provides appellants a tool for concealing the actual racial motive.

Representative McMahan (*see id.* at 83a) also assert that maintaining the 6-6 "partisan balance" in the North Carolina congressional delegation was a primary goal of the General Assembly. Senator Cooper claims that the Twelfth District's boundaries were based not on race but on partisan considerations and that the district was designed to be a "Democratic island in a largely Republican sea," with precincts chosen for inclusion in the district on the basis of their percentages of Democratic voters. *See id.* at 77a.

The speciousness of this "partisan disguise" becomes evident when the facts of the 1997 plan and the demographics of districts neighboring District 12 are closely examined. A number of the predominantly black precincts in Mecklenburg County which were placed in the Twelfth District – precincts which also are predominantly Democratic – are directly adjacent to precincts that are predominantly white and Democratic. The predominantly white Democratic precincts, however, were placed in the neighboring Ninth District. If District 12 was created as a Democratic district, there is no reason why these precincts were excluded, especially in light of their voting performance in the 1990 U.S. Senate election in North Carolina. Democratic senatorial candidate Harvey Gantt, an African-American, received the majority of votes in these predominantly white precincts over incumbent Republican Senator Jesse Helms. For example, Precinct 10 of Mecklenburg County is predominantly white in population (89 percent), and is 63 percent Democratic. Seventy-three percent of the votes in Precinct 10 were cast for Gantt in 1990 – certainly a sound showing of support for an African-American candidate across racial and party lines. Precinct 21 of Mecklenburg County is 85 percent white, and 59 percent Democratic; and 60 percent of its voters chose Mr. Gantt. Precinct 38 gave 54 percent of its votes to Gantt, and is 52 percent Democratic, yet it too was excluded from District 12 – and its white population is 85 percent. All three precincts were

excluded from District 12 – apparently left to sink in the "Republican sea." Similar statistics prove the same situation exists in Forsyth and Guilford counties under the 1997 plan.[34] As the district court concluded, "The common thread woven throughout the districting process is that the border of District 12 meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive." App. at 20a.

This Court recognized a similarly specious "partisan disguise" in the recent Texas redistricting litigation. There the State defendants argued, just as appellants do here, that the gerrymandered districts were drawn with political, not racial, motivations. This defense was rejected because "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." *Bush v. Vera*, 116 S. Ct. 1941, 1956 (1996). However, disregarding *Bush*, the General Assembly used race to achieve an intended result of having two African-American members of Congress – who would inevitably be Democrats.[35]

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[34]In Forsyth County, Precinct 1408, which is 71% white, is two-thirds Democratic and cast three-fourths of its votes for Gantt in 1990, was excluded from District 12. Precinct 1422 – two-thirds white and three-fourths Democratic – cast three-fourths of its votes for Gantt yet was excluded. In Guilford County, Precinct 11, which is 80% white and 62% Democratic, gave 67% of its votes to Gantt but was excluded. Precincts 14 and 17, which are respectively 58% and 62% Democratic and 82% and 85% white, also granted overwhelming victories to Gantt; yet both were excluded from District 12.

[35]The circumstance that in North Carolina more than 95 percent of African-American registered voters are Democrats makes it easier to disguise the legislature's racial motivation. However, even appellants' own expert concluded that there exists "a substantial correlation between the path taken by the boundary of the Twelfth District and the racial composition of the residents of the precincts touching that boundary, the tendency being to include precincts within the district which have relatively high black representation." Peterson Aff. (App. at 87a).

Appellants have often claimed that the 1997 plan was based in part on "incumbency considerations," which in turn were closely related to maintaining the existing partisan balance. Allegedly, the twelve districts were drawn so that no incumbent from the 1992 election (which took place under an unconstitutional districting plan) was placed in the same district as another incumbent. *See* App. at 74a-75a. Moreover, the plan was drawn to include select groups of voters within or without certain districts in order to preserve the electoral chances of those incumbents.[36]

Protecting an unconstitutionally-elected incumbent is a questionable method of "correcting the condition which offends the Constitution," the purported goal of an equitable remedy. *Swann*, 402 U.S. at 16. This is especially true when, as here, it is apparent that the legislature used the race of voters placed in Districts 12 and 1 to achieve the intended result of having two African-American Representatives from North Carolina. Accepting the rationale of appellants' argument would permit the total negation of the Court's decisions in other cases involving racial gerrymandering; it signifies that a result obtained by racial gerrymandering can thereafter be perpetuated if the legislators recite that they wish to "protect incumbents" or "maintain partisan balance." Indeed, under appellants' logic the identical plan held unconstitutional in *Shaw II* could be reenacted on the grounds that it was no longer racially

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[36]In a discussion on the House Floor on March 26, 1997, Rep. McMahan offered reasons why he believed District 12 would "stand a Court test." "1. Not a Majority/Minority District .... 2. Population in 12 has homogeneous interest – comprised of many citizens living in an urban setting. 3. Drawn to protect the Democratic incumbent." State's Section 5 submission, 97C-28F-4F(1), at 2. In a committee meeting the previous day, Rep. McMahan stated that District 12 "recognizes racial fairness and is friendly to our incumbents which we [Sen. Cooper and Rep. McMahan] both determined on the front end to be an important consideration in the process." 97C-28F-4E(4) at 1.

motivated but instead was politically motivated.[37]

Interestingly, in justifying the 1997 plan with its 46.67 percent black Twelfth District, appellants used the same justification of "partisan balance" and "maintaining incumbents" that they have used in attempting to justify the 1998 redistricting plan – which has a 35 percent African-American population, does not split all of its five counties, and is more geographically compact.[38] In short, the legislators now claim to be able to meet their "partisan objectives" with a district that is less racially-gerrymandered. This, in itself, is another indication that the 1997 plan was chosen instead of some other plan more consistent with traditional race-neutral districting principles because the 1997 plan gave more certainty of reaching the desired racial result.

IV. DISTRICT 12 IS SUBJECT TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

In their jurisdictional statement, appellants state the "Questions Presented" in a misleading way.[39] Moreover, the

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[37]As indicated in the Counterstatement, appellants have already displayed their adroitness in moving from one rationale to another, i.e., beginning in 1992 with a defense against the political gerrymandering suit that the plan was racially gerrymandered, and later seeking to justify the plan as having a political motivation. The numerous, oft-repeated contradictions and evasions on the part of appellants serve to impeach their affidavits and constitute implied admissions of the actual racial-based motive. *Cf.* Wigmore, *Evidence* §§ 1040, 1060 (1972 ed.).

[38]*See* Mem. Op. (App. at 178a-79a).

[39]Contrary to Question 1's implication, the "shape and racial demographics" of District 12 were not "standing alone." Those circumstances and many others – such as the state's evasive tactics over a seven-year period – lead any objective factfinder to the inevitable conclusion that a racial motive was paramount. Similarly, contrary to Question 3's implication, the Twelfth District was more than "slightly irregular," the concentration of African-Americans was much higher in District 12 and many of its precincts than in adjoining districts and precincts, and the district violated many of the race-neutral criteria which – intermittently – the state purported to be following.

jurisdictional statement erroneously intimates that the pronouncements of *Shaw I* and *Shaw II* are irrelevant to the 1997 version of District 12 because the population of that district was only 46.67 percent black – rather than majority-black. *See, e.g.*, Question 3, J.S. at I; 27.[40] However, the opinion of the Court in *Miller*, 515 U.S. at 916, speaks in terms of a "significant number" of persons being placed "within or without" a certain district because of their race. Clearly a "significant number" of African-Americans in Guilford and Forsyth counties – over 113,000 – were placed in the Twelfth District because of their race. Nothing in the Court's opinion in *Bush*, 517 U.S. at 962-63, suggests that strict scrutiny does not apply when a legislature neglects traditional districting criteria due to a predominantly racial motive, whether or not a district is majority-minority. Although appellants rely on *Lawyer*, 117 S. Ct. at 2191, 2195, the challenged district in that case – though not majority-minority – did not "stand out as different in shape" from other Florida districts, and the plaintiffs' circumstantial evidence was insufficient to prove a predominantly racial motive.

In the present case, the evidence of the legislature's disregard of traditional districting principles is overwhelming, and the district court properly concluded that there was no

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[40]In drawing the Twelfth District, the legislators also labored under the false impression that *Shaw*'s indictment of racial gerrymanders applied only to majority-minority districts. *See, e.g.*, Comments of Rep. McMahan, *supra* n.35; *see also* Comments of Sen. Cooper during Senate Floor Debate of March 27, 1997 ("*[T]he test outlined in Shaw vs. Hunt will not even be triggered because [District 12] is not a majority minority district* and you won't even look at the shape of the district in considering whether it is constitutional") (97C-28F-4F(2), at 5) (emphasis added).

litigable issue as to whether this placement was primarily motivated by race.[41] It inevitably follows under *Shaw*, *Miller*, and *Bush* that the test of strict scrutiny must be applied.[42] In that event, District 12 fails the test and the 1997 plan is unconstitutional.

CONCLUSION

For the foregoing reasons, appellees respectfully request this Court to dismiss the appeal, or, in the alternative, to summarily affirm the decision of the court below.

Respectfully submitted,

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Attorneys for the Appellees

August 26, 1998

**Counsel of Record*

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[41]The district court had before it, *inter alia*, the declarations of Dr. Ron Weber, Dr. Tim O'Rourke, and other leading experts who explained why they readily concluded that race was the predominant motive for District 12. *See, e.g.*, P-A App. at 5a-7a.

[42]Admittedly, when strict scrutiny is applied, special rules may apply to a majority-black district, *see Thornburg v. Gingles*, and a majority-minority district may be created if there is a "geographically-compact" majority-minority population. 478 U.S. 30, 50-51 (1986). However, the appellants' assertion that strict scrutiny was improperly applied suggests that appellants have confused the *Gingles* preconditions with the requirements of *Shaw* and its progeny.

APPENDIX

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SHAW v. HUNT, CA 92-202-CIV-5-BR, ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*, Plaintiffs,	)	
and	)	
JAMES ARTHUR "ART" POPE, *et al.*, Plaintiff-Intervenors,	)	
v.	)	ORDER
JAMES B. HUNT, JR., *et al.*, Defendants,	)	
and	)	
RALPH GINGLES, *et al.*, Defendant-Intervenors.	)	

Defendants' motion to consolidate *Cromartie v. Hunt* (No.4:96-CV-104-H) (E.D.N.C.) and *Daly v. High* (No.5:97-CV-750-BO) (E.D.N.C.) with the above-captioned matter is DENIED.

SHAW ORDER OF OCTOBER 16, 1997, CONT'D . . .

This 16 October 1997.

For the Court: /s/ W. Earl Britt
United States District Judge

DEFENDANTS' MEMORANDUM, JULY 22, 1998

[Caption omitted in printing]

DEFENDANTS' MEMORANDUM IN SUPPORT OF CONSOLIDATION

Defendants have moved the Court pursuant to Federal Rule of Civil Procedure 42(a), to consolidate for purposes of trial the case of *Daly v. Leake*, No. 5:97-CV-750-BO(3), with the case of *Cromartie v. Hunt*, No. 4:96-CV-104-BO(3). Consolidation of these cases is appropriate because the actions involve common questions of law and fact; in addition, consolidation will avoid the risk of inconsistent adjudications and limit the burden on parties, witnesses and available judicial resources posed by separate trials.

FACTS

The *Daly* litigation involves an equal protection challenge to various North Carolina State House and State Senate Districts,[1] as well as Congressional Districts 1 and 3, as unconstitutional racial gerrymanders. Similarly, the *Cromartie* litigation involves an equal protection challenge to Congressional District 1 as an unconstitutional racial gerrymander.[2] Both of these cases are currently pending

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[1] *Daly* plaintiffs are challenging House Districts 7, 28, 79, 87, 97 and 98, and Senate Districts 4, 6, 7, 38, and 39.

[2] *Cromartie* includes a challenge to Congressional District 12 in the State's 1997 congressional plan, Section 2 of Chapter 11 of the 1997 Session Laws. However, the challenge to District 12 has been rendered moot by the judgment of this Court declaring District 12 unconstitutional and the permanent injunction requiring the State to enact a new congressional plan, Chapter 2 of the 1998 Sessions Laws [*sic*] (the 1998 plan), which substantially modified the boundaries of District 12. *Daly* also includes challenges to Congressional Districts 5, 6, 9 and 12 in the 1997 congressional plan. These challenges have been rendered moot by the

DEFENDANTS' MEMORANDUM, JULY 22, 1998, CONT'D . . .

before the same three-judge panel.

* * * *

This the 22nd day of July, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

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enactment of the 1998 congressional plan which substantially modified the boundaries of these four districts. Neither the *Cromartie* or *Daly* plaintiffs have amended their complaints to challenge District 12 in the 1998 plan. Because Districts 1 and 3 were re-enacted in the 1998 legislation with no modifications to their boundaries, these claims by the *Cromartie* and *Daly* plaintiffs are not moot.

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[Caption omitted in printing]

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38. To sum up my conclusions about the predominant use of race and the subordination of race-neutral traditional districting principles to race by the state of North Carolina in the creation of the Congressional districts in 1997, I find that a significant number of persons are assigned to districts in eastern North Carolina and the Piedmont Region based on race. I conclude that race was a predominant factor in the construction of Districts 1, 3, 9, and 12. To a lesser extent race also affected the drawing of Districts 5, 6, and 10 in that certain counties in those districts were split on a racial basis. I also conclude that race-neutral traditional districting principles were subordinated in the creation of these districts. The state of North Carolina did not adhere to compactness in creating the districts, more counties, cities, and towns were split than needed in constructing the districts, and community of interest regions were not followed in the design of the districts. I found districts 3, 9, and 12 to be only technically contiguous, and that those three districts were not functionally contiguous.

III. NUMEROSITY AND CONCENTRATION OF AFRICAN-AMERICAN VOTERS

39. I conclude that the African-American voting age population in no part of North Carolina is sufficiently numerous or geographically compact enough to be a majority of voters using traditional districting principles to draw a single-member Congressional district. An equitably populated Congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census of Population data. First, an examination of maps and statistical data at the county, city, and precinct levels by race indicates that there are is [*sic*] only one

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potential area where one might locate enough African-American persons of voting age to create a geographically compact district. The area is in the northeastern part of the state located primarily among the counties of the Inner Coastal Plain region.

* * * *

CONCLUSION

46. On the basis of my above analysis, I conclude:
(1) that race was the predominant factor used by the state of North Carolina to draw the boundaries of the 1997 U.S. Congressional districts;
(2) that the state of North Carolina in creating the 1997 U.S. Congressional districting plan subordinated traditional race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations;
(3) that the African-American voting age population in North Carolina (particularly the northeastern part of the state) is not sufficiently large nor geographically concentrated enough to constitute a potential voter majority using traditional districting principles to draw a single-member Congressional district;
(4) that the majority-minority U.S. Congressional Districts 1 and 12 in the 1997 North Carolina plan is overly safe from the standpoint of giving a candidate of choice of African-American voters an opportunity to be elected, thus questioning whether the plan was narrowly tailored to satisfy a compelling state interest.

I declare under the penalty of perjury that the foregoing

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is true and correct.

Executed on this twenty third day of March, 1998.

/s/ Ronald E. Weber, Ph.D.